SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 320

NATHAN GREENBERG,
Petitioner,

v.

PANAMA TRANSPORT COMPANY ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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v.

PANAMA TRANSPORT COMPANY ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Nathan Greenberg, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 5, 1961, vacating for lack of jurisdiction judgment of the United States District Court for the District of Massachusetts and the order of the said Court of Appeals denying rehearing entered on May 24, 1961.

Opinions Below.

The opinion of the District Court for the District of Massachusetts is reported in 185 F. Supp. 320 (*infra*, p. 14).

The opinion of the Court of Appeals for the First Circuit is reported in 290 F.2d 125 (*infra*, p. 24). The petition for rehearing was denied without an opinion.

Jurisdiction.

The judgment of the Court of Appeals was entered May 5, 1961, (*infra*, p. 26). A petition for rehearing was filed and denied on May 24, 1961, (*infra* pp. 27, 28). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

Questions Presented.

1. Did the decision of the Court below misapply the rule promulgated by this Court in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, in that the Court of Appeals failed to follow the standard required by *McAllister* v. *United States*, 348 U.S. 19, that the finding of the essential elements of diversity jurisdiction by the District Court cannot be set aside unless upon a review of the entire record it is clearly erroneous?
2. Did the decision of the Court below conflict with the Court of Appeals for the Fourth Circuit?
3. Should the Court of Appeals have considered the alternative basis of jurisdiction, Sec. 1333 of the U.S.C. 28?

Statement of the Case.

This is a diversity action brought in the District Court of Massachusetts by Nathan Greenberg, an attorney, against Panama Transport Company (hereinafter referred to as "Panama") and Esso Tankers, Inc., (hereinafter referred to as "Esso") in which the petitioner seeks to recover money damages for a wrongful interference by the

respondents with an advantageous contractual relationship between the petitioner and one Vazquez, a seaman.

Petitioner is a member of the Bars of the United States Court of Appeals for the First Circuit, the United States Court for the District of Massachusetts, the Commonwealth of Massachusetts, and the State of Maine.

On December 9, 1958, as a result of a previous reference by a seaman, Torres, petitioner was retained by Jose Vazquez, who was seriously injured on December 6, 1958, while working as a seaman on the SS Esso ROCHESTER at a time when the vessel was docked at Portland, Maine. This vessel was of Panamanian registry and owned by Panama, a Panamanian corporation. Vazquez on December 9, 1958, executed a written retainer employing petitioner to represent him with respect to his claim against Panama. (R. 211) Vazquez fully understood the terms of the retainer, as it was carefully explained to him at the time of execution. (R. 24, 33-36, 211) Vazquez had shipped under a Spanish contract with Panama, which provided for certain disability benefits of which Vazquez was cognizant. (R. 44, 45)

Panama is an affiliate of Standard Oil Company, New Jersey, a United States corporation. (R. 128, 129) The record and exhibits indicate that Esso was another affiliate of Standard Oil Company and was vitally concerned with Vazquez and the vessel Esso ROCHESTER. (R. 127)

Petitioner subsequently brought both an action pursuant to the Jones Act and an admiralty action in the United States District Court for the Southern District of New York on behalf of Vazquez against Panama, seeking recovery of damages resulting from his accident.

On December sixteenth one Heidtman, employed by Esso Standard Oil Company (R. 131) and acting for respondents at the request of Eggleston, assistant chief of seafaring personnel for Esso, (R. 66, 127) visited Vazquez at the

Mercy Hospital in Portland. Petitioner was visiting Vazquez at that time and informed Heidtman that he was Vazquez's attorney. (R. 65, 66) Heidtman then left and telephoned Eggleston in New York and then returned later the same day with an interpreter to ask Vazquez whether he had retained the petitioner. (R. 67) Eggleston, to whom it had been reported that Vazquez had retained an attorney, accompanied by one Esparza, an interpreter and a port steward employed by Esso, visited Vazquez on December eighteenth to determine if this report was correct. At this point Eggleston was informed by a telephone call from New York that action had been entered on behalf of Vazquez and that Vazquez had retained an attorney. (R. 70, 71) Eggleston and his interpreter returned later on the same day to the hospital and discussed with Vazquez the matter of retention of counsel. (R. 71, 72) Evidence was introduced that Eggleston told Vazquez that he had no need of an attorney and that he should discharge petitioner and the respondents would take care of him in line with their employment contract and that if Vazquez did not discharge petitioner the respondents would keep the case in court for a long time, and the petitioner would take all the money from the case. (R. 25, 26, 144, 145, 224)

Vazquez rejected the urgings of Eggleston. On December 26, 1958, one Gordon, at the direction of Eggleston, presented a letter in Spanish to Vazquez, discharging petitioner; but Vazquez rejected it. (R. 53, 54) On December twenty-third Eggleston had written a letter to Consulmar, a Spanish company that had recruited Vazquez to work for respondents, enlisting the assistance of Consulmar to bring pressure on Vazquez to discharge the petitioner. (R. 217) On December thirty-first Consulmar wrote to Vazquez deprecating the use of injured aliens by local American counsel and intimating that such action would jeopardize Vazquez's employment contract. (R. 222) Consulmar

in a letter to Eggleston written January 5, 1959, and which enclosed a copy of its letter of December thirty-first to Vazquez included an unsolicited attack on a segment of the American Bar as being interested exclusively in obtaining only large fees in cases involving injured aliens. (R. 219) Eggleston wrote Consulmar on January 20, 1959, and again on January 28, 1959, advising that Vazquez had not as yet seen fit to discharge the petitioner. (R. 220, 221) On February third a person who recommended Vazquez to Consulmar for employment wrote Vazquez, stating, among other things, the writer's displeasure in learning of Vazquez's retention of counsel and impugning the seaman's loyalty to his employer. (R. 223)

Finally on February 10, 1959, Vazquez signed a letter discharging the petitioner. (R. 212) The letter had been drafted by a priest who was in Vazquez's room and was subsequently mailed by Heidtman, who was also present during the drafting of the discharge letter. (R. 68)

The trial judge, after a jury-waived trial, rendered an opinion and judgment in favor of the petitioner in the amount of $2,845. (*infra* pp. 14-23; R. 192-201) The trial court found the requirements of diversity of citizenship and amount in controversy had been fully satisfied.

With respect to the improper and unwarranted interference by respondents against petitioner in his relation to his client, the Court wrote:

> "From the evidence as a whole this Court concludes that defendants by misrepresenting the role which American lawyers can and often do perform for their clients in accident litigation, by falsely leading Vazquez to believe that his own best interests would be served by relying exclusively on his Spanish contract, and by depreciating, without any basis for so doing, the professional services which Greenberg was pre-

> pared to render Vazquez, knowingly and in bad faith caused Vazquez to dismiss his counsel Greenberg in February, 1959." (*infra*, p. 18)

The District Court applied federal law rather than state law in determining the validity of petitioner's retainer with his client and his claim of tortious interference by the respondents. A few law review articles were written on this phase of the Court's opinion. See 61 COLUMBIA LAW REVIEW 287 (1961); 6 VILLANOVA LAW REVIEW 101.

Respondents appealed, and the Court of Appeals vacated the judgment of the District Court for lack of jurisdiction. The Court of Appeals found the element of jurisdictional amount had not been satisfied by the petitioner. (*infra*, pp. 24-26)

Of most importance, the respondents at no time raised the defense of lack of jurisdiction either in the District Court or in their brief in the Court of Appeals. The Court of Appeals on its own initiative despite the contrary finding of the District Court dismissed the action for lack of jurisdictional amount.

Petitioner moved for a rehearing, asserting in his petition that the Court of Appeals had failed to fully consider the evidence on the question of jurisdictional amount. Further, that the Court had failed to consider the alternative basis of jurisdiction, 28 U.S.C. sec. 1333, spelled out by the District Court in its opinion; and that the judgment of the Court of Appeals should be amended to eliminate the costs of $994.03 imposed on petitioner in view of the fact respondents had never interposed the jurisdictional defense either in the District Court or in the Court of Appeals. The Court of Appeals denied the petition for rehearing without an opinion. (*infra* pp. 27, 28)

Reasons Relied Upon for Allowance of Writ.

1. The Decision of the Court Below Misapplies the Rule Promulgated By This Court In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586 In That The Court of Appeals Failed To Follow The Standard Required By *McAllister* v. *United States*, 348 U.S. 19 75 S. Ct. 6 That The Findings of the Essential Elements of Diversity Jurisdiction by the District Court Cannot Be Set Aside Unless Upon A Review of the Entire Record It Is Clearly Erroneous.

In the case of *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, (*supra*) at page 289, this Court stated the test to be applied to the jurisdictional issue as follows:

> "But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

This test was recently reaffirmed in the case of *Horton* v. *Liberty Mutual Insurance Co.*, decided June 12, 1961. 81 S. Ct. 1570.

What was the evidence before the District Court on the issue of diversity jurisdiction?

Petitioner did testify at the trial that "the case was worth around $25,000." (R. 16)

Petitioner during his deposition before trial testified as follows:

> "Q. You are now suing Panama Transport Company and Esso Tankers in the District Court of Massa-

chusetts to recover damages in the sum of $10,000 on the ground that you had a contract with Mr. Vasquez which terminated because of interference by the defendants? A. That is correct, with one modification. I am suing for $15,000.

Q. Is that $15,000 that you mentioned based upon your fees earned as of the time of your discharge? A. Based on many elements. Do you want me to tell you?

Q. I just want you to answer the question, Mr. Greenberg. That is all. A. It is based on that and other factors too.

Q. In other words, you don't maintain that as of the time you were discharged that you had earned by professional services the sum of $15,000?

Mr. Malone: Do you understand the question?

The Witness: I really do not understand the question.

Mr. Malone: Could you phrase it in some other way?

Q. Yes. You have asked for $15,000 damages here. Tell me what you base it on. A. Well, I base it on any number of factors. I base it on the fact that this was a tort claim; that the injuries involved were serious, involving a personal injury to some of the members of the body of Mr. Vasquez; that the case would have resulted, I feel that it was a good liability case as far as the claim itself against the company is concerned; and I felt that it would end up either by settlement or by trial in a real substantial verdict."

"Q. How much in trial? A. I cannot tell you the exact amount.

Q. I take it on this $15,000 it is just an estimate of a possible fee that you might have earned? A. It is an estimate of what I felt—I mean it might not have

been exactly as high as that, but it is an estimate I felt I would have earned as an attorney.

Q. Would that mean on the basis of the retainer that you would recover a verdict or a settlement for $45,000? A. To take $15,000 I would have to recover $45,000.

Q. And according to your retainer, your fee is limited to one-third of the recovery? A. That is right." (R. 116, 117)

This testimony of the petitioner amounted to an opinion that the case had a value of $45,000. Pursuant to Rule 26, sec. (d), subdivision (2), which provides that the deposition of a party may be used by an adverse party for any purpose, respondents offered petitioner's deposition in evidence, and it was accepted by the trial court. (R. 74) Petitioner in his testimony at the trial as to the value of the case did not vitiate or restrict in any way his earlier opinion given at the deposition hearing. (R. 16) The District Court had before it the varying opinions of petitioner as to the worth of the case and besides evidence as to the serious nature of the injuries. Surely, the trial judge was justified in giving petitioner's evidence by deposition as much credence as his actual trial testimony. Evidently, the District Court found that petitioner's testimony by deposition as to the $45,000 figure fully established the good faith of petitioner respecting the jurisdictional amount. In its opinion the District Court found the necessary amount and took jurisdiction as a case within the diversity jurisdiction of the court. (R. 197, *infra* p. 20)

The Court of Appeals ignored petitioner's testimony as to the $45,000 value of the case despite the fact it was called to its attention in the petition for rehearing. In essence, this Court substituted its own judgment as to the facts relating to jurisdictional amount. Reference by the Circuit

Court in its opinion to the actual money recovery by petitioner in the District Court is irrelevant on the vital issue of good faith. *St. Paul Mercury Indemnity Co.* (*supra*) at page 289; *Burke* v. *Texas Co.*, 5 Cir., 211 F.2d 443 . The Court of Appeals did not hold that the trial court's findings were clearly erroneous, but it simply ruled on the facts in place of the trial judge. In so doing, it violated the standard enunciated by this Court in *McAllister* v. *United States*, 348 U.S. 19, 75 S. Ct. 6, that the Court of Appeals may not set aside a finding below unless it is clearly erroneous. See also 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A.; *Boston Ins. Co.* v. *Dehydrating Process Co.*, 1 Cir., 204 F.2d 441, 444.

A consideration of petitioner's testimony as to $45,000 value precludes a finding with legal certainty that petitioner's claim was less than the jurisdictional amount. An application of the good faith test set forth in the *St. Paul Mercury Indemnity Co.* and *Horton* cases (*supra*) compel a finding that petitioner made his claim in good faith.

Apart from the opinion expressed by petitioner on the value of his claim, Judge Wyzanski was fully justified in finding the jurisdictional amount present solely from the extensive injuries sustained by Vazquez as established by the evidence. The injuries consisted of amputations of the tips of three fingers, fracture of the tip of the left radial styloid, displaced fracture of the pelvis, necessitating an open reduction with wire fixation, and acute thrombophlebitis. (R. 203, 207, 208, 209) Petitioner's instant action is one of tort seeking uncertain damages. In *News, Inc., et al.* v. *Buescher et al*, 81 F. Supp. 741, 742 (N.D. Ill. E.D.—1949), the Court wrote:

> "In a tort action, where the damages are unliquidated, it is almost impossible to hold that there is a lack of jurisdictional amount. For all intents and

purposes the amount in question is what the plaintiff seeks as damages."

The Supreme Court stands in review of the District Court's finding on jurisdiction in exactly the same position as did the Court of Appeals. *McAllister* v. *United States* (*supra*) pp. 20-21. In the words of this Court "there has been no other showing, let alone a showing 'to a legal certainty' of any lack of good faith" on the part of the instant petitioner in asserting the lawsuit exceeded $10,000. The District Court from the evidence was fully warranted in finding the elements of jurisdiction fully satisfied, and the Court of Appeals erred in vacating this finding and dismissing the action.

2. The Decision of the Court Below Conflicts With The Court of Appeals for The Fourth Circuit.

In *McDonald* v. *Patton*, 240 F.2d 424 at 426 (4 Cir.—1957), the test of diversity jurisdiction was formulated as follows:

"In applying this test, it has been further recognized that while good faith is a salient factor, it alone does not control; for if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction. Such is the doctrine laid down in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845. However, the legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim. *If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional pur-*

poses, in favor of the subjective good faith of the plaintiff." (emphasis supplied)

The Court of Appeals in the case at bar employed a strict interpretation of the test laid down in *St. Paul Mercury Indemnity Co.* (*supra*). All doubts were resolved against the subjective good faith of the petitioner. There would seem to be a direct conflict between the Fourth and First Circuits on the application of the jurisdictional test.

3. The Court of Appeals Failed To Consider The Alternative Basis of Jurisdiction, Sec. 1333 of U.S.C. 28.

The District Court in its opinion wrote as follows on the jurisdictional issue:

"Plaintiff has chosen to present this case as one falling within the diversity jurisdiction of this Court. There being the necessary diversity of citizenship and amount in controversy, this Court is content to take jurisdiction on that basis. 28 U.S.C. § 1332(a). It is unnecessary to consider whether in view of Greenberg's claim that defendants interfered with a professional relationship between a proctor and officer of a United States admiralty court and his client additional bases of jurisdiction could have been invoked. Cf. 28 U.S.C. § 1333(1). See also 28 U.S.C. § 1331(a)." (R. 197; *infra* p. 20)

Sec. 1333 provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime juris-

diction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

No jurisdictional amount is required if Sec. 1333 is applicable to the present action.

It was incumbent on the Circuit Court to consider fully the District Court's references to Sec. 1333 as a basis for jurisdiction. This consideration was particularly pertinent in view of the Circuit Court's rejection of the diversity of jurisdiction basis of the claim as accepted by the District Court.

Conclusion.

There is a vital need by the lawyers of this country and the public that the lawyer-client relationship in a tort action be inviolate and that corporations be deterred from interfering with this professional relationship. The Circuit Court's action in dismissing the complaint on jurisdictional grounds nullified the District Court's able and eloquent defense of the fundamental rights of a lawyer representing injured persons in accident litigation.

For the reasons spelled out in this petition, the writ of certiorari should be granted.

Respectfully submitted.

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Boston, Massachusetts
Attorney for Petitioner.

APPENDIX A

Opinion of the District Court.

NATHAN GREENBERG
v.
PANAMA TRANSPORT COMPANY
and
ESSO TANKERS, INC.
Civ. A. No. 59-617.
United States District Court
D. Massachusetts.
July 1, 1960.

Daniel J. Hourihan, Boston, Mass., for plaintiff.

Joseph F. Dolan, Boston, Mass., Walter X. Connor, of Kirlin, Campbell & Keating, New York City, for defendants.

WYZANSKI, *District Judge*.

1. This is a diversity action by Nathan Greenberg, a lawyer who is a citizen of Massachusetts, against a Panamanian and a New Jersey corporation for interference with advantageous contractual relations.

2. Greenberg is a member of, *inter alia*, the bars of the courts of the State of Maine, the Commonwealth of Massachusetts, and of this United States District Court.

3. Jose Vazquez is a Spanish citizen who on December 6, 1958 was employed as a seaman aboard the S. S. Esso Rochester, a ship of Panamanian registry, owned by a Panama corporation, Panama Transport Company, all the stock of which was owned by Esso Tankers, Inc., an American corporation.

4. Under his contract of employment, executed outside the United States, and presumably in Spain, Vazquez had, in the event of injury, a right to disability payments cal-

culated according to a percentage of his wages, and also an award on account of any permanent partial disability. It does not appear that the Spanish contract expressly or impliedly precluded the seaman from seeking any judicial or administrative remedy available to him on account of any injury. So far as appears, the contract offered merely an optional and not an exclusive form of compensation for injury.

5. While working aboard ship in the Portland, Maine harbor, Vazquez was caught by the runner rope to the head of the winch. He sustained a tourniquet amputation of the tips of the third and fourth fingers of the left hand and of the tip of the fourth finger of the right hand, a fracture of the neck of the proximal phalanx of the left index finger, a fracture of the tip of the radial styloid, and a fracture of the wing of the left ilium. He was promptly admitted to the Mercy Hospital in Portland. Without a recital of all the medical history, it will for present purposes suffice to say that as a result of the accident Vazquez was out of employment for four months and incurred hospital and medical bills of about $400.

6. Torres, another seaman, informed Greenberg of Vazquez's injury and Vazquez's wish to have Greenberg as his counsel. Greenberg sent his associate, Malone, in Torres's company to see Vazquez in Portland. On December 9, 1958 Vazquez, voluntarily, without being subject to any improper inducement, and fully understanding the tenor of his action, executed a document retaining Greenberg to represent him "respecting any claim against the S. S. Esso Rochester, its owners and operators * * *. For such services, I agree to pay my said attorney a fee not to exceed services rendered. I agree to pay my said attorney a fee not to exceed one-third of any amount collected by way of court verdict or settlement."

7. Upon the basis of the disclosed facts and the dis-

coverable law, Greenberg believed that Vazquez had valid causes of action under the Jones Act and under the general maritime law both against his employer and the American corporation which owned all the stock of the employing corporation. This was certainly a reasonable view before that part of the February 24, 1959 decision in Romero v. International Terminal Operating Co., 358 U.S. 354, 381-385, 79 S. Ct. 468, 3 L. Ed. 2d 368, which affirmed the dismissal against Compania Transatlantica. And even after the Romero case the claim may still be reasonable in view of the fact that an American corporation owned all the stock in the Panamanian corporation which employed Vazquez. Cf. Bartholomew v. Universe Tankships, Inc., 2 Cir., 263 F.2d 437.

8. After Vazquez had retained him, Greenberg went to Portland on December 16, 1958. While the client and attorney were conferring, Heidtmann, acting for both defendants, went to visit Vazquez. Having learned that Greenberg was Vazquez's attorney, Heidtmann at once informed Eggleston, the Assistant Chief of the Seafaring Personnel Section of Esso Tankers, Inc., who was in New York.

9. Leaving New York the next day, Eggleston, accompanied by a Spanish-speaking associate, Esparza, visited Vazquez in the hospital December 18. Eggleston told Vazquez what his contractual rights were and what Eggleston thought of U. S. lawyers and how they handled seamen's claims. These statements went far beyond a mere factual recital of Vazquez's legal rights and Vazquez's freedom to discontinue retaining Greenberg. They were deliberate misrepresentations of the role of American lawyers, of the services which they customarily render to injured seamen, and of the advantages which seamen derive from claims made in American courts. Eggleston's principal purpose was not to give disinterested, candid information to Vaz-

quez, but, on the contrary, was deviously to promote defendants' interest by inducing Vazquez to settle his claim against defendants on the terms of a Spanish contract less favorable to Vazquez than would be the value of the claim presented to a United States Court.

10. In the middle of his conversation with Vazquez, Eggleston was called to the telephone. His New York associates then informed him that the present defendants had just then been served with process in a suit brought against them in the Southern District of New York by Vazquez represented by correspondents of Greenberg.

11. Vazquez did not respond at once to Eggleston's suggestion that he should dismiss Greenberg. But it is fairly inferable that Eggleston's arguments had a continuing effect on Vazquez.

12. Not satisfied with such pressure as he himself had been able to bring upon Vazquez to discharge Greenberg, Eggleston on December 28, 1958 and on January 28, 1959 wrote to a Spanish firm, Consulmar S. L. This firm was the intermediary through which Vazquez and other seamen procured employment on the S. S. Esso Rochester and other vessels in which Americans had direct or indirect interests. On behalf of defendants, Eggleston informed Consulmar that Vazquez had retained Greenberg, that defendants "have pointed out to him [Vazquez] that it is possible for him to discharge his attorney [illegible]. However, as yet we have had no definite commitment from the injured man that he intended to go along with the company and discharge his lawyer." The correspondence, as a whole, makes it clear that in their own interest, and by unjustifiably disparaging American lawyers, defendants sought to have Consulmar persuade Vazquez to discharge Greenberg.

13. Responding to defendants' requests, Consulmar on December 31, 1958 wrote to Vazquez that "it sometimes happens that disabled men in [the] U.S.A. are induced by

local Agents who seek a share of the claim not caring for the future of the person involved and you are under a Spanish Contract, I would like to advise you of the risk you could meet should you leave aside the Contract's conditions under which you were employed and which covers you largely in this accident."

14. Finally the efforts of defendants directly through Consulmar were successful. February 13, 1959 Vazquez dismissed Greenberg. As Eggleston wrote to Consulmar on February 18, "Mr. Vazquez stated it was his earnest desire to continue sailing for Panama Transport Company and that he was willing to accept what is called for under the terms of the employment contract."

15. February 16, 1959 Vazquez left the United States for Spain. His flight to Spain was paid for by defendants.

16. It is fairly inferable that after dismissing Greenberg as his counsel and leaving the United States, Vazquez either discontinued his action in the Southern District of New York against defendants or manifested an intention never to prosecute it to completion.

17. From the evidence as a whole this Court concludes that defendants by misrepresenting the role which American lawyers can and often do perform for their clients in accident litigation, by falsely leading Vazquez to believe that his own best interests would be served by relying exclusively on his Spanish contract, and by depreciating, without any basis for so doing, the professional services which Greenberg was prepared to render Vazquez, knowingly and in bad faith caused Vazquez to dismiss his counsel Greenberg in February 1959.

18. As of the time in February 1959 when Greenberg was dismissed as counsel, Vazquez's claim was worth in Greenberg's opinion $25,000. In this valuation Greenberg took into account, among other considerations, defendants' potential liability for Vazquez's injury, the damages he

sustained, the place the injury occurred, the American incorporation of defendant Esso Tankers Inc., the decision in Bartholomew v. Universal Tankships, Inc., 2 Cir., 263 F.2d 437, other cases before and after Romero v. International Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 was decided, and Greenberg's own experience in handling seamen's litigation. However, this Court considering these same factors, the extent to which Greenberg had by February 1959 been able to prepare the case for trial, the uncertainties of jury verdicts, and the doubtful points of law, finds that as of February 1959 Vazquez's claim was worth $15,000.

19. This Court finds that for the services performed by Greenberg up to the time that he was discharged a reasonable fee would be $500 plus expenses of $95. To be sure, for these amounts Vazquez himself is liable to Greenberg. But defendants have made it unlikely that Greenberg can ever collect that sum from Vazquez. Defendants have caused Vazquez to leave this country. Also defendants have induced Vazquez either to dismiss or not to prosecute the action which, if successful, would have produced a judgment on which Greenberg might have had directly or indirectly the benefit of an attorney's lien. If defendants had not caused Vazquez to discharge Greenberg, and if Greenberg had carried the case to the point of settlement, or of trial and judgment, Greenberg would have had an opportunity to earn an additional fee. The additional amount which Greenberg might have reasonably expected to earn and which defendants precluded him from earning was an additional $4,500. However, since this amount would have required an expenditure of additional effort and time by Greenberg, which he now need not expend but can devote to other clients, this Court regards $2,250 as a fair valuation of the future earnings of which Greenberg has been deprived. In short, this Court finds that Green-

berg's damages from the loss of his retainer amount to $500 plus $95 plus $2,250 or a total of $2,845.

Having made the foregoing findings of fact this Court now turns to the questions of law.

Plaintiff has chosen to present this case as one falling within the diversity jurisdiction of this Court. There being the necessary diversity of citizenship and amount in controversy, this Court is content to take jurisdiction on that basis. 28 U.S.C. § 1332(a). It is unnecessary to consider whether in view of Greenberg's claim that defendants interfered with a professional relationship between a proctor and officer of a United States admiralty court and his client additional bases of jurisdiction could have been invoked. Cf. 28 U.S.C. § 1333(1). See also 28 U.S.C. § 1331(a).

Despite the fact that this case is presented as one within the diversity jurisdiction, it does not automatically follow that, in considering the validity of Greenberg's retainer, this Court must turn to the state law of Massachusetts for guidance as to the appropriate conflict of laws rules or the appropriate substantive rules. O'Brien v. Western Union Tel. Co., 1 Cir., 113 F.2d 539. Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165. The claims for which Vazquez retained Greenberg arose out of the general maritime law and out of an Act of Congress, the Jones Act. Such claims, while theoretically presentable in either a state court or a federal court, are usually presented in a federal court. And, in fact, presentation before the federal court in the Southern District of New York did occur in the case at bar.

To hold that the validity of a retainer to perform services in a federal court with respect to a federal cause of action should be determined by state law would seem highly artificial. Every policy consideration dictates that the federal courts should enunciate uniform national rules to determine the validity of contracts made by proctors in

admiralty, who are officers of federal courts, to present claims to federal courts. That is, there should be "a uniform national rule of law, binding on state and federal courts alike, where the operative legal policies are federal in origin." Paul A. Freund, Federal-State Relations In The Opinions of Judge Magruder, 72 Harv. L. Rev. 1204, 1213.

Applying a national rule of law, this Court concludes that the contract under which Vazquez retained Greenberg was valid. The contract was an entirely normal arrangement. It did not in the technical sense provide for a contingent fee. And the terms of compensation fall within the zone of reasonableness.

Having determined that the retainer contract is governed by federal law, and that under such law the contract is valid, the Court must next consider what law governs a claim that defendants have tortiously interfered with the contract. It is usually assumed that in connection with the tort of interfering with advantgeous contract relations, as in connection with torts generally, the governing rule is supplied by the law of the place where the tort occurs. Hendler v. Cuneo Eastern Press, Inc., 2 Cir., 279 F.2d 181. Restatement, Conflicts §§ 378, 384. But the grounds of logic, history, convenience, and policy which support this doctrine in many cases, particularly cases of physical injury, are not appropriately invoked in every type of case. Different torts may be governed by different principles of conflict of laws. Cf. Gordon v. Parker, D.C.D. Mass. 83 F Supp. 40, affirmed sub nom. Parker v. Gordon, 1 Cir., 178 F.2d 888. See A. A. Ehrenzweig, Alienation of Affections In the Conflict of Laws, 45 Cornell Law Qu. 514, 515. And the conflict of laws rules governing even the particular tort of interference with advantageous contractual relations may depend upon what type of contract relationship is said to have been impeded.

Here we have a claim that when sued in a federal court defendants interfered with the contractual relationship between the then plaintiff who was suing them and his attorney, the present plaintiff. In determining the applicable law to decide this claim, it does not seem of the greatest importance where that interference occurred. Nor does it seem of decisive importance in what forum the claim of alleged interference is made. The controlling principles of substantive law should be enunciated on a national basis applicable to anyone who is said to have interfered with a professional relation between an officer of a national court and his client. Cf. O'Brien v. Western Union Tel. Co., 1 Cir., 113 F.2d 539. See Freund, op. cit.

The federal courts being free to apply a national rather than a state standard to claims that defendants have interfered with relations between federal lawyers and their clients, the federal courts would probably mould the national standard with appropriate references to Restatement, Torts, §§ 766-774. Drawing upon those sections as well as the general case law this Court concludes that in the case at bar defendants, without a privilege so to do, have induced Vazquez not to continue his professional relations with Greenberg and are therefore liable to Greenberg for the damages thereby caused to Greenberg.

On the facts already found there can be no room for doubt that defendants deliberately induced Vazquez to discontinue his relations with Greenberg. Cf. Restatement, Torts, § 766. But it is suggested that defendants were merely trying to persuade Vazquez to abide by his obligations under a Spanish contract with his employer, defendant Panama Transport Co., and that, therefore, the inducement was privileged. The argument, premised upon Restatement, Torts § 773 and Hendler v. Cuneo Eastern Press Inc., 2 Cir., 279 F.2d 181, is that "The plaintiff's interest in freedom from interference with contract rela-

tions may be invaded with impunity by the defendant in protecting a contract right of his own." To that argument the short answer is that defendants had no contract "rights" of their own, and Vazquez had no "obligations". The Spanish contract between defendant Panama Transport Co. and Vazquez gave defendants no "rights". It imposed upon Vazquez no "obligations". It merely gave Vazquez a set of optional payments for his injury. That Spanish contract did not purport to preclude Vazquez from suing in United States courts the Panamanian company, much less Esso Tankers, Inc. And if it had so purported, such preclusive provision would have been invalid. 46 U.S. C.A. § 688. See Bay State Dredging & Contracting Co. v. Porter, 1 Cir., 153 F.2d 827, 832.

To say the same thing in another way, defendants were not trying to get Vazquez to abide by his obligation, they were trying to induce him to choose to deal with them directly instead of dealing with his lawyer. And in connection with these efforts defendants resorted to misrepresentations which were close to calumny. Their unwarranted and malicious interference with the professional relation between Vazquez and Greenberg makes them liable to Greenberg for the damages of $2,845 which Greenberg suffered. Keene Lumber Co. v. Leventhal, 1 Cir., 165 F.2d 815, 61 Harv. L. Rev. 897-898.

Judgment for plaintiff for $2,845.

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 5770.

PANAMA TRANSPORT COMPANY ET AL.,

DEFENDANTS, APPELLANTS,

v.

NATHAN GREENBERG,

PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Walter X. Connor, with whom *Joseph F. Dolan*, *James P. O'Neill*, and *Kirlin, Campbell & Keating* were on brief, for appellants.
Daniel J. Hourihan for appellee.

OPINION OF THE COURT.

May 5, 1961.

PER CURIAM. A Spanish seaman and member of the crew of the SS Esso ROCHESTER was injured on board his vessel on December 6, 1958, while it lay in the harbor of Portland, Maine. On December 9, 1958, a member of the bar employed by the plaintiff-appellee, who is a member, *inter alia*, of the Maine and Massachusetts bars practicing in Boston, visited the seaman in a Portland hospital and obtained the seaman's signature to a retainer in the following language:

> "I hereby retain Nathan Greenberg, attorney-at-law, of Boston, Massachusetts and New York, New York to represent me respecting my claim against the

> SS Esso Rochester its owners and operators, and to collect damages on my behalf. For such services rendered, I agree to pay my said attorney a fee not to exceed services rendered. I agree to pay my said attorney a fee not to exceed one-third of any amount collected by way of court verdict or settlement.
>
> Dated this 9th day of December, 1958."

Subsequently the seaman was visited by representatives of the defendants, one of them the owner of the vessel and the other its husbanding agent, and eventually on February 10, 1959, the seaman wrote the plaintiff a letter discharging him as counsel on the ground that his services were no longer required.

The plaintiff-appellee then brought this action on the law side of the court below under its diversity jurisdiction for wrongful interference by the defendant-appellants with his advantageous contractual relationship with the seaman. After trial without a jury the court gave judgment for the plaintiff and the defendants appealed.

The appeal suggests a number of interesting questions but we do not reach them for lack of jurisdiction.

The allegations of the complaint with respect to the diversity of the citizenship of the parties and the amount in controversy between them are adequate to show federal jurisdiction. But the plaintiff testified categorically that, in his opinion based on his experience as a specialist in suits in admiralty for personal injuries, the seaman's "case was worth about $25,000." Thus on the plaintiff's own testimony the gross fee he could possibly receive under his retainer would be one third of that amount or $8,333.33, and, of course, his profit from the business would be substantially less.[1]

---

[1] The District Court found that actually the seaman's case was worth $15,000 and that the plaintiff's damages for the loss of his retainer amounted to $2,845.

Out of his own mouth the plaintiff satisfies us to a legal certainty that he did not have a claim for the amount necessary to confer federal jurisdiction and either knew or reasonably ought to have known that fact. On the authority of *Williams* v. *Nottawa*, 104 U.S. 209 (1881); *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938):[2]

Judgment will be entered vacating the judgment of the District Court and remanding the case to that court with direction to dismiss the complaint for lack of jurisdiction.

APPENDIX C

Judgment.

May 5, 1961.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that court with direction to dismiss the complaint for lack of jurisdiction.

By the Court.

(s) ROGER A. STINCHFIELD
Clerk

Approved:

(s) PETER WOODBURY, Ch. J.

---

[2] See also the "Historical and Revision Notes" to § 1359, 28 U.S.C.A.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 5770.

PANAMA TRANSPORT COMPANY
ET AL.,
DEFENDANTS, APPELLANTS,

v.

NATHAN GREENBERG
PLAINTIFF, APPELLEE.

PETITION FOR REHEARING

Now comes plaintiff in the above action, in which judgment was entered by this Court, and pursuant to Rule 31 presents herewith his petition for rehearing and assigns for cause the following:

I. The Court Failed to Fully Consider Plaintiff's Evidence on the Issue of Jurisdictional Amount. The Evidence as a Whole Justifies the Decision of the District Court that the Requirements of Diversity Jurisdiction were Satisfied.

II. The Court Failed to Consider the Alternative Basis of Jurisdiction, Sec. 1333 of 7 U.S.C. 28.

III. The Judgment of the Court Should Be Amended to Eliminate Costs Imposed on the Plaintiff.

Wherefore, for the foregoing grounds and for other reasons set forth in plaintiff's brief, it is respectfully requested that a rehearing be granted in this action and that the judgment of this Court be stayed pending the disposition of this petition.

(s) Daniel J. Hourihan
One Court Street
Boston, Massachusetts
Attorney for Plaintiff, Appellee

I, Daniel J. Hourihan, attorney for the plaintiff, certify that the foregoing Petition for Rehearing is presented in good faith and not for purpose of delay.

(s) Daniel J. Hourihan

APPENDIX E

Order of Court.

May 24, 1961.

It is ordered that the petition for rehearing filed by appellee on May 19, 1961, be, and the same hereby is, denied.

By the Court.

(s) Roger A. Stinchfield
Clerk.

Office-Supreme Court, U.S.
FILED
SEP 29 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 320.

NATHAN GREENBERG,
Petitioner,

against

PANAMA TRANSPORT COMPANY and
ESSO TANKERS, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WALTER X. CONNOR,
Attorney for Respondents,
120 Broadway,
New York 5, N. Y.

JAMES P. O'NEILL,
JOSEPH F. DOLAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 320.

NATHAN GREENBERG,

Petitioner,

against

PANAMA TRANSPORT COMPANY and ESSO TANKERS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

Petitioner, a Boston lawyer, applies for a Writ of Certiorari on the ground that the Court of Appeals for the First Circuit erroneously reversed a judgment in his favor because of lack of jurisdictional amount. Petitioner's suit was based on diversity of citizenship and asked damages in the sum of $15,000. Petitioner charged that he suffered monetary losses by reason of respondents' alleged malicious interference with a contractual relationship between him and one, Jose Vazquez, a seaman. The contract was a retainer under which petitioner was to receive one third of any sums recovered in behalf of Vazquez in his claim for damages for personal injuries.

In the trial court, respondents maintained that the contract was unenforceable because, among other things, it was champertous under the law of the State of Maine and that Vazquez had been induced to sign it on mis-representations made by petitioner's agents. Respondents maintained also that there had not been any interference, malicious or otherwise, with the contract and that any dealings respondents had with Vazquez, after he had retained petitioner, related solely to their obligation to provide Vazquez with medical care and attention, and were in the performance of other duties required under the Spanish contract between Vazquez and Panama. The other respondent, Esso Tankers, Inc., hereafter called "Esso" acted as agent for Panama, which is a Panamanian corporation.

The Court of Appeals, in dealing with the respondents' defenses above mentioned, said: "The appeal suggests a number of interesting questions but we do not reach them for lack of jurisdiction" (Pet.'s App. p. 25).

In his petition for a Writ, petitioner asserts that there was some testimony which would support a finding that there was sufficient amount in controversy to maintain federal jursidiction in this diversity suit. However, on his own testimony petitioner conceded lack of the necessary jurisdictional amount. The Court of Appeals said:

> "* * * But the plaintiff testified categorically that, in his opinion based on his experience as a specialist in suits in admiralty for personal injuries, the seaman's 'case was worth about $25,000.' Thus on plaintiff's own testimony the gross fee he could possibly receive under his retainer would be one third of that amount or $8,333.33, and, of course, his profit from the business would be substantially less.
>
> "Out of his own mouth the plaintiff satisfies us to a legal certainty that he did not have a claim for the

> amount necessary to confer federal jurisdiction and either knew or reasonably ought to have known that fact." * * * (Opinion of the Court of Appeals, First Circuit—Pet.'s App. pp. 25, 26)

The trial court determined that the petitioner's services were far less valuable. It concluded that the value of Vazquez's claim was $15,000 and that petitioner's services were worth but $2,750.00. The court allowed $95.00 for petitioner's disbursements—making a total of $2,845 (196, 197).*

Questions Presented.

1. Was the Court of Appeals correct when it concluded as a matter of law that there was no jurisdiction on the facts where petitioner conceded that his damages could not exceed the statutory limit, and where the trial court so found?

2. In the absence of a finding by the trial court that petitioner lacked good faith in claiming damages in excess of the statutory amount, could not the Court of Appeals make this finding where the evidence amply supported its conclusion?

3. Whether the judgment of the Court below conflicts with the decision of the Court of Appeals for the Fourth Circuit in *McDonald* v. *Patton,* 240 F. 2d 424 (1957)?

4. Whether an action for malicious interference with a contractual relationship between attorney and a seaman comes within the admiralty or maritime jurisdiction of the federal court and, therefore, does not require the amount in controversy to exceed $10,000?

---

* References are to respondents' appendix in the Court of Appeals.

Counter Statement of the Facts.

Because petitioner's "Statement of the Case" refers to matters which are not borne out by the record references cited and because the "Statement" is incomplete, respondents find it necessary to make this counter statement.

Jose Vazquez, a Spanish national, was employed on a vessel flying the Panamanian flag. Following his injuries on December 6, 1958, he was hospitalized at Mercy Hospital, a private institution in Portland, Maine on the same day. On December 7 or 8, petitioner received a telephone call from one, Torres, who was then in Boston, informing petitioner about Vazquez (34). Petitioner did not know where Torres had obtained the information about Vazquez and did not know whether Torres was acquainted with Vazquez (36).

On December 9, 1958, Torres and a Mr. Malone, a Boston lawyer employed by petitioner, were dispatched by petitioner from Boston to Portland to procure a retainer. Mr. Malone took along a printed form of retainer (34) although, at the time, petitioner was not under any oral retainer by Vazquez (34). Petitioner did not know the circumstances under which the retainer was signed (36), nor could he say from personal knowledge that Vazquez understood the nature of the retainer and his legal rights.

Mr. Malone was not called by petitioner to testify. Torres was not produced on the trial because, as petitioner testified, he was dead.

Petitioner did not explain to Vazquez his rights under his contract with Panama (49). Petitioner does not speak Spanish and Vazquez did not understand English (19) so that petitioner never had any direct conversation with Vazquez (113).

Petitioner offered in evidence the deposition of Arthur W. Eggleston, an employee of Esso, in which Eggleston testified to the reasons which Vazquez gave for signing petitioner's retainer. Vazquez told Eggleston that men from Boston told Vazquez that he had been abandoned by his employer (Panama); that he would be a "cripple" for life; that Panama would send him back to Spain and "just dump him"; that "he would never ship again"; and that he would have no way to provide for his family (139). Vazquez signed the retainer but he did not understand it (139, 140).

Vazquez testified on a deposition but it was excluded by the trial court. However, one Esparza, a port steward of Esso (138) testified that he spoke Spanish and that Vazquez made similar statements to him (57, 58, 60).

When petitioner was examined before trial he refused to answer questions about how the retainer had been procured and it was necessary for respondents to obtain an order from the court compelling him to do so (107, 111).

On December 16, Heidtmann, a representative of Esso happened to be in Portland on other business and, in accordance with company practice, visited Vazquez in the hospital to see how Vazquez was getting along. Heidtmann found two men at Vazquez's bedside. One of these men said that he was Vazquez's lawyer but he did not identify himself further nor did he show a retainer (66). (This was the first notice to respondents that Vazquez had engaged a lawyer). Heidtmann reported this state of affairs to Eggleston (66). Heidtmann returned to the hospital later the same day with an interpreter but did not learn anything more from Vazquez (67, 68).

On December 18, Eggleston and Esparza attended at the hospital to ascertain if Vazquez had, in fact, hired a

lawyer and also to make certain that Vazquez was receiving appropriate medical attention and that his wants were being attended (69). At this meeting Vazquez confessed that he was wrong in engaging a lawyer (144). He was informed that if he wished he could discharge the lawyer.

On December 26, Gordon, another Esso representative, while on other business called on Vazquez to see how he was progressing and to ascertain whether Vazquez was in need of anything (51). At the same time Gordon offered Vazquez a letter written in Spanish which Vazquez could use if he wished to discharge his lawyer (53). Gordon speaks only a few words of Spanish and thus could not and did not hold a full discussion with Vazquez (51, 52).

In the early part of January 1959 at the suggestion of Torres, petitioner visited Vazquez (25). At this time Vazquez said he intended to continue with petitioner as his lawyer (41). No representatives of respondents called on Vazquez after December 26. On February 10, 1959, Vazquez notified Esso that he wished to see a representative. Accordingly, Heidtmann made a second call on Vazquez (68). At this time, the hospital chaplain, Father Romani, a Roman Catholic priest, was present. After a discussion between Vazquez and Father Romani, who spoke Spanish, the latter, at Vazquez's direction, prepared a letter in English discharging petitioner. Vazquez signed this letter and Heidtmann mailed it (68).

Prior to this request to see a representative of the respondents, Vazquez had received a letter from a personal friend in Spain (190), and on the basis of this letter decided that his interests were best protected by discontinuing his suit and returning to Spain (176, 177, 184). He consulted with Father Romani who agreed that this was Vazquez's best course (177, 178).

Consulmar, an independent company which supplies Spanish crews to steamship companies (130), also wrote to Vazquez. Esso had no control over Consulmar (167) but had written to Consulmar, reporting Vazquez's accident (153, 154). Consulmar had no connection with respondents except that it furnished Spanish crews to ships operated by Panama and other companies (130). The letter by Consulmar was not at the instance of respondents but in connection with the unique relationship which it has with Spanish crewmen (154, 161).

All of the respondents' witnesses denied having told Vazquez that it would take years to dispose of his case or that his lawyer would take all the money recovered or that Panama would take better care of him (Gordon, 52; Esparza, 61; Eggleston, 72).

On the other hand, petitioner did not produce any proof rebutting respondents' testimony that Vazquez did not understand the retainer agreement or that Vazquez had been induced to sign it because of Torres' misrepresentations as to respondents.

Reasons for Denying the Writ.

It is a well recognized principle that the certiorari jurisdiction of this Court is a power which is sparingly exercised, and then only in cases which are of grave and general importance. The history of the use of this power was clearly set forth in Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500, at pages 530-531, where he stated:

> "Thereafter such [FELA] cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts

> of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course apply also to applications for certiorari to review judgments and decrees of the highest Courts of States'. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163-164. (See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258: Certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.')"

This Court has frequently held that it will not grant certiorari to review evidence or discuss specific facts, *United States* v. *Johnston*, 268 U. S. 220, 227. See also *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178. Since petitioner's brief falls squarely within the above prohibitions, this petition should be denied.

POINT I.

THE COURT BELOW CORRECTLY HELD, IN ACCORDANCE WITH THE DECISIONS OF THIS COURT THAT PETITIONER HAD FAILED TO ESTABLISH THE NECESSARY JURISDICTIONAL AMOUNT TO MAINTAIN FEDERAL JURISDICTION. *McAllister* v. *United States*, 348 U. S. 19 HAS NO APPLICATION TO THE CONCLUSION OF LAW FOUND BY THE COURT BELOW THAT THE AMOUNT IN CONTROVERSY WAS INSUFFICIENT TO MAINTAIN FEDERAL JURISDICTION.

A.

This Court has established that the amount demanded in the complaint is not the sole criterion on which to judge whether federal jurisdiction exists in a diversity suit. The rule is that if facts are developed on the trial which show lack of monetary jurisdiction the Court may *sua sponte* dismiss for lack of jurisdiction. *St. Paul Indemnity Co.* v. *Red Cab Company*, 303 U. S. 283 where the Court said at page 290:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed this is the court's duty under the Act of 1875."

Concededly petitioner's testimony on the trial showed that there was not the necessary monetary amount in controversy to satisfy the jurisdictional requirement. The trial court awarded petitioner only $2845 for fees and

disbursements. Petitioner was obviously satisfied with the award. He took no appeal although the amount awarded was less than 20% of the amount demanded in his complaint. Petitioner moved for re-argument in the court below but again did not complain that the amount awarded him was inadequate.

Indeed, in his brief in the court below, petitioner stated on page 11 "Plaintiff had evaluated Vazquez's claim as worth $25,000. The Court's estimate was only $15,000 and evidence on this issue justified this figure." Implicit in this argument is petitioner's concession that in no event could his damages exceed $5,000 and, therefore, no jurisdiction existed.

It follows that petitioner knew that the amount demanded was excessive and colorable to obtain jurisdiction. The award was based on petitioner's own testimony which did not establish the necessary jurisdictional amount. The court below gave the petitioner the benefit of the doubt stating that on petitioner's own testimony his recovery could not exceed $8,333.33. This again is less than the necessary jurisdictional amount.

The next question is whether the petitioner's demand for $15,000 was intended as a means of securing the district court's jurisdiction or, for its intimidating effect on defendant. In either event, petitioner's good faith is placed in issue.

The district court made no specific finding as to petitioner's good faith. The Court of Appeals specifically found as follows: "Out of his own mouth the plaintiff satisfies us to a legal certainty that he did not have a claim for the amount necessary to confer federal jurisdiction and either knew or reasonably ought to have known that fact" (Pet. App. 26).

This conclusion of law by the Court of Appeals is not here challenged on this petition for a Writ of Certiorari. True petitioner confuses this conclusion of law with a finding of fact.

The trial court found as a fact that the *Vazquez* case had a value of $15,000. On the basis of a one third retainer, the most that could be recovered by petitioner was $5,000. However, as the trial court found, this fee could be recovered only if petitioner had completely handled the case to a conclusion. Accordingly, petitioner was not entitled to the full fee because his service terminated early in the litigation and it was not necessary for him to expend additional effort. He could devote his time to other clients. Accordingly, the court held that the fair value of his fee, including the value of past services and those which he might have earned in the future was $2,750. (196, 197)

It is apparent from the findings of the two courts below that the demand in the complaint for $15,000 damages was not in good faith as understood under the principles established by this Court. Really it was a colorable claim intended to obtain jurisdiction over the respondents in the federal court or an attempt to impress respondents. This is emphasized by the small amount of work which the petitioner did in behalf of Vazquez. Petitioner's testimony as to this work was:

> • • • "Q. Well, I would like to know what work you did do prior to your discharge? A. I secured a full history on the case, analyzed the case. I made arrangements to start a law suit, contacted a law firm in New York, had them institute the law suit, had the man examined by a specialist up in Portland" • • • (118).

Petitioner's good faith may be tested by the evasive way in which he testified on his deposition before trial. Some

of this testimony curiously enough is set forth in petitioner's brief in this Court (pp. 7-9). The significant part of this testimony follows:

> • • • "Q. In other words, you don't maintain that as of the time you were discharged that you had earned by professional services the sum of $15,000?
>
> Mr. Malone: Do you understand the question?
>
> The Witness: I really do not understand the question." • • •

This evasiveness was not due to any lack of understanding about the value of *Vazquez's* case nor petitioner's rights thereunder. It is quite evident that he knew what the value of the case was but was attempting to conceal it so as not to early expose the basic lack of federal jurisdiction of his claim.

The burden of petitioner's argument is that the district court and the Court of Appeals should have considered the *Vazquez* case to be worth $45,000 and on this assumption that petitioner's damages were sufficient to satisfy the jurisdictional limits. This question has never been raised before. As indicated above, petitioner not only did not appeal from the fact finding of the district court as to the value of *Vazquez's* case but urged the court below that this finding was correct. In support of this new contention, petitioner cites self-serving declarations made on examination before trial and ignores the testimony which he gave in open court voluntarily and without equivocation to his own counsel. Even the self-serving declaration is not a clear statement, based on his experience as a specialist in the admiralty field, that the *Vazquez* case was worth $45,000. The testimony quoted in petitioner's brief is neither clear-cut nor definite. All the petitioner said was that in order for him to recover the amount demanded in the complaint

he would have to make a recovery in the *Vazquez* case of $45,000. His testimony means nothing more. In any event, even if it could be said that the testimony was definite, petitioner repudiated it on the trial and there gave his opinion as an expert that the *Vazquez* case was worth but $25,000. The trial court did not accept even this estimate and found as a fact that it was worth but $15,000. The petitioner was satisfied with this.

Now he argues that his testimony on the trial did not vitiate the testimony given on his examination before trial. There is a substantial difference between $45,000 and $25,000 as the experienced and expert petitioner well knows. The very argument which the petitioner now makes that the trial testimony did not vitiate the earlier testimony clearly exposes petitioner's lack of good faith in the demand made in his complaint.

The court below recognized this absence of good faith and reversed the conclusion of law of the trial court that there was jurisdiction.

It is a well established rule that even an appellate court must notice the absence of the elements requisite to original jurisdiction. *Williams* v. *Nottawa*, 104 U. S. 209; *Robinson* v. *Anderson*, 121 U. S. 522. Even if the question of lack of jurisdiction is not raised by either of the parties, the appellate court is free to act *sua sponte* upon any disclosure, whether in the pleadings or the proofs, which satisfies the Court, in the exercise of a sound judicial discretion, that the plaintiff did not, in fact, have a claim for the jurisdictional amount. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184; *Morris* v. *Gilmer*, 129 U. S. 315.

The importance of good faith as to allegations of jurisdictional amount, was noted by Judge Irving R. Kaufman

in *Brown* v. *Bodak,* 188 F. Supp. 532 (S. D. N. Y. 1960) at page 533:

> "The inquiry should be a careful one, in light of the clear Congressional policy, expressed at the time of the recent amendment raising the requisite jurisdictional amount requirements. It was the intention of Congress to remove from the federal courts claims insubstantial in character, which contributed to the mounting backlogs of these courts. See 1958 U. S. Code Congressional and Administrative News pp. 2594-95. If plaintiff could avoid the jurisdictional amount requirements merely by alleging damages in excess of the jurisdictional amount, the purpose of this amendment would be largely negated."

A plaintiff in a diversity suit always has the burden of proving jurisdiction. This is a continuing burden even in appellate courts. *McNutt* v. *General Motors Acceptance Corp., supra,* pp. 182-189; *KVOS* v. *Associated Press,* 299 U. S. 269. Petitioner's brief fails to support this burden.

B.

In arguing that the court below did not follow the rule in *McAllister* v. *United States,* 348 U. S. 19, petitioner, on page 11 of his brief, quotes as language of this Court words which will not be found in the *McAllister* opinion. It is assumed that this was unintentional. However, respondents call this mis-quotation to this Court's attention so that there will be no confusion.

McAllister, supra, does not stand for the proposition that a court of appeals which notes error in a legal conclusion made by the district court may not reverse the legal error. All that *McAllister* stands for is that when

a district court makes findings of fact which are not clearly erroneous, the Court of Appeals may not set aside the findings.

In the case at bar, the reversal was for an erroneous conclusion of law. Both the district court and the court below found that the amount recoverable by petitioner was far less than the necessary jurisdictional limit. The court below went on to say that petitioner, (an expert in the field of negligence litigation) "knew or reasonably ought to have known" that his damages were insufficient to confer federal jurisdiction.

Petitioner never asserted in the court below that the findings of fact by the district court or by the court below were clearly erroneous.

As pointed out above petitioner conceded in the court below that the evidence on the trial justified the court's findings that the *Vazquez* case was worth but $15,000. It follows that there was no departure from the *McAllister* rule by the court below.

POINT II.

PETITIONER FAILS TO SHOW ANY CONFLICT OF OPINIONS BETWEEN THE COURTS OF APPEALS FOR THE FIRST AND FOURTH CIRCUITS.

On page 11 of his brief, petitioner contends that the Fourth Circuit's opinion in *McDonald* v. *Patton,* 240 F. 2d 424 (CA 4th 1957) conflicts with the decision of the court below. The *McDonald* case itself demonstrates the fallacy of this contention.

McDonald was a suit for damages for the negligent destruction of plaintiff's automobile. Three elements of damages were alleged totaling: $3000, $67.90 and $14.00.

Defendant moved the district court on plaintiff's pleadings and before answer to dismiss for lack of jurisdiction on the ground that the latter two items were not recoverable. The Court of Appeals held that these two items of damages were recoverable and reversed the dismissal. All that the *McDonald* case stands for is where the complaint alleges recoverable damages in excess of the jurisdictional amount the court will maintain jurisdiction where there is no lack of good faith apparent in the pleadings. In the case at bar, lack of good faith in al. ging damages was clearly established on the trial.

For a case where after a trial, the court concluded that the jurisdictional demand was colorable see *Matthiesen* v. *NorthWestern Mutual Insurance Co.*, 286 F. 2d 775, (C. A. 5th 1961). There the plaintiff sued for $20,000 damages for personal injuries. The trial court determined that plaintiff's damages were far below the jurisdictional amount and therefore dismissed the action. On appeal the plaintiff argued that "* * * no one but the injured party can really know whether he honestly believes that he is entitled to a recovery to as much as $10,000" (P. 776). The Court of Appeals sustained the dismissal, cited *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, and said, page 777:

> "We think, however, that in determining what the Courts mean by 'good faith' we find the answer given by the Supreme Court in the St. Paul Mercury Indemnity Company case, *supra*. There on page 290 of 303 U. S., on page 590 of 58 S. Ct. of the opinion the Court said:
>
> 'If, from the proofs, the court is satisfied to a like certainty (i.e. legal certainty) that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.' "

POINT III.

PETITIONER'S CAUSE OF ACTION WAS BASED ON A TORT COMMITTED ASHORE WITHIN THE STATE OF MAINE WITH RESPECT TO A CONTRACT MADE IN THE STATE OF MAINE AND GOVERNED BY STATE LAW. THE CAUSE OF ACTION DOES NOT FALL WITHIN THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL COURT.

In Point 3 of his brief, petitioner, conscious of a lack of merit in his other arguments, seeks certiorari on the ground that this Court should take cognizance of the suit as a maritime matter. Notably, no cases are cited for this proposition and the relevant cases cited by respondents in the court below are ignored.

This Court has held that a contract between an attorney and his client is governed by state law. *In Re Paschal*, 77 U. S. 483. The same rule was applied by this Court in *Dickinson, as Receiver of the Chicago, Rock Island & Pacific Railway Company* v. *Stiles*, 246 U. S. 631. In the latter case, a lawyer sought damages because of interference by the Railroad with his contract of retainer with a railroad employee under which the lawyer undertook to sue for damages under the Federal Employers' Liability Act. 46 USC 51. The Jones Act (46 USC 688) incorporates this statute. A seaman's contract with an attorney to sue a shipowner in his behalf for damages under the Jones Act is also governed by state law. *Bennett* v. *Sinclair Navigation Co.*, 33 F. Supp. 14 (D. C. E. D. Pa.).

In the case at bar, the mere fact that a seaman's contract was involved does not afford maritime jurisdiction. *Clinton* v. *West Coast Local No. 90*, etc., 161 F. Supp. 177 (D. C. ND CAL 1955). The alleged tort took place on

shore and not on navigable waters, thus, excluding the application of the statute giving jurisdiction in maritime matters (28 USC 1333).

In *The Plymouth,* 70 U. S. 20, a ship caught fire while at a dock and the fire was negligently permitted to spread to the dock where it caused damage to cargo. This Court held no admiralty jurisdiction and said at page 35:

> • • • "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters." • • •

It was held in *Crain* v. *American Waterways Corporation,* 143 F. Supp. 256, (DC ED Pa. 1956) that a slanderous statement made by a shipowner against a seaman is not a maritime tort if not made on navigable waters. Similarly, in *Forgione* v. *United States,* 202 F. 2d 249 (CA 3rd 1953) cert. den. 345 U. S. 966, false arrest and imprisonment ashore of crew members by the ship's master was held not to be a maritime tort.

The case at bar is even further away from maritime cognizance. Here the alleged tortious conduct related to a lawyer and had no relation to a ship, seaman, or navigable waters. *Great Lakes Transit Corporation* v. *Marceau,* 154 F. 2d 623 (C. A. 2d 1946).

CONCLUSION.

In the language of *Layne etc. Co.* v. *Western Well Works*, 261 U. S. 387, 393, a writ of certiorari should not be granted "* * * except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals." The case at bar has no public importance. There is no conflict among the circuits and the petition itself is wholly without merit. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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